STATE OF MICHIGAN

COURT OF APPEALS

KENNETH I. DANIELS,

Petitioner-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

UNPUBLISHED
February 20, 2007

No. 264527
Ingham Circuit Court
LC No. 04-001011-AA

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Petitioner, an incarcerated prisoner acting *in propria persona*, appeals by leave granted from the circuit court's order dismissing his petition for judicial review for lack of jurisdiction pursuant to MCL 791.255(2) and granting the motion of respondent Michigan Department of Corrections (MDOC) to affirm the decision of a hearing officer finding petitioner guilty of major misconduct. We affirm.

Corrections Officer Angel Marrero completed a Major Misconduct Report indicating that he was completing his rounds when he entered the prison's "quiet room" and found petitioner there. Petitioner got up from his chair and said he was going to use the bathroom. When Marrero told him to sit down, petitioner refused and proceeded toward the door. When petitioner grabbed Marrero by the lapel, Marrero radioed for assistance, at which point petitioner kneed him in the groin, grabbed him, and advanced towards him, causing him to fall on his back, with petitioner on top of him. Officer Scott Oliver rushed in to assist, along with other officers. Several other corrections officers submitted statements that were generally consistent with Marrero's version of the events. On the basis of this and other evidence submitted by respondent, the MDOC hearing officer found petitioner guilty of assault and battery on a corrections officer.

Petitioner first argues that the circuit court erred in determining that it lacked jurisdiction over his petition pursuant to MCL 791.255(2). This issue presents a matter of statutory construction, which is a question of law that is reviewed de novo by this Court. *Keenan v Dep't of Corrections*, 250 Mich App 628, 630; 649 NW2d 133 (2002).

Pursuant to § 55(2) of the Corrections Code of 1953, MCL 791.201 *et seq*., a prisoner may seek judicial review of an adverse decision of the MDOC or a hearing officer:

> Within 60 days after the date of delivery or mailing of notice of the decision on the motion or application for the rehearing, if the motion or application is denied or within 60 days after the decision of the department or hearing officer on the rehearing, a prisoner aggrieved by a final decision or order may file an application for direct review in the circuit court in the county where the petitioner resides or in the circuit court for Ingham county. [MCL 791.255(2).]

Accordingly, an aggrieved party must file a petition for judicial review within 60 days of the delivery or mailing of a denial of a rehearing request. *Seaton-El v Dep't of Corrections*, 184 Mich App 454, 455; 458 NW2d 910 (1990).

Nevertheless, a prisoner, while not excused from paying filing fees, is not prevented from filing his application for review as a consequence of indigency. MCL 600.2963; MCR 2.002; *Keenan, supra* at 630. MCL 600.2963(1) provides for the suspension by the circuit court of the filing of a prisoner's civil action or appeal where the prisoner makes a claim of indigency supported by a certified copy of his institutional account. Section 2963(1) further provides that the prisoner shall, within 21 days after the date of the order suspending the action or appeal and ordering a filing fee or partial filing fee, resubmit to the court all documents pertaining to the action or appeal, together with the required filing fee or partial filing fee and a certified copy of the court order. In *Keenan, supra* at 631, this Court held that

> a prisoner's application for direct review is timely if it was submitted to the circuit court, with a claim of indigency under MCL 600.2963(1), within the sixty-day limitation period of MCL 791.255(2), and, then, resubmitted with the required filing fee and documents, in conformity with a circuit court order and within the twenty-one-day requirement of MCL 600.2963(1).

In this case, petitioner timely requested a rehearing following entry of the hearing officer's decision finding him guilty of assault and battery. Petitioner's request for rehearing was denied by the hearings administrator in a decision mailed on April 2, 2004, and allegedly received by petitioner on April 12, 2004. In a petition dated May 27, 2004, and stamped as having been received by the circuit court on June 2, 2004, petitioner sought judicial review of the hearing officer's decision; petitioner additionally submitted a motion for the suspension of fees and costs on the basis of indigency. On June 28, 2004, the circuit court issued an order suspending petitioner's cause of action and ordering, pursuant to § 2963, that petitioner pay a partial filing fee and resubmit, within 21 days of the order, all documents relating to the action along with the partial filing fee. The circuit court received petitioner's partial filing fee and resubmission of documents on July 14, 2004, and stamped his petition for judicial review and motion for suspension of fees and costs as filed on that date.

Respondent contends the petition was not timely filed because it was not received by the circuit court until June 2, 2004, 61 days after the mailing of the decision denying petitioner's request for rehearing. Petitioner has submitted a United States Post Office "Domestic Return Receipt," which, he contends, demonstrates that his petition was actually received by the circuit court on June 1, 2004, the 60th day after the mailing of the denial of petitioner's request for rehearing. However, the Domestic Return Receipt was date-stamped "June 1, 2004" by the

United States Post Office, *not* by the circuit court. Moreover, the petition itself was stamped as having been received by the circuit court on June 2, 2004.

However, § 55(2) provides that a prisoner must file his petition within 60 days of the "*delivery* or mailing" of the notice of the decision on rehearing (emphasis supplied). See *Seaton-El*, *supra* at 455. Petitioner asserts that the decision on rehearing was delivered to him on April 12, 2004. Although he has presented no documentary evidence in support of this contention, it is undisputed that the decision was mailed by the MDOC on April 2, 2004, and it is therefore reasonable to assume that petitioner could not possibly have received the decision until some point on or after April 3, 2004. Under these circumstances, we conclude that the circuit court's receipt of the petition and claim of indigency on June 2, 2004, renders the petition timely filed pursuant to *Keenan*, *supra*, where petitioner resubmitted his petition, together with the partial filing fee, within 21 days of the circuit court's suspension order. Accordingly, the circuit court erred to the extent that it dismissed this action on the ground that it was untimely filed.

The circuit court alternatively affirmed petitioner's major misconduct citation by granting respondent's motion to affirm. In regard to the major misconduct citation, petitioner argues that he has demonstrated violations of his due process rights where he was denied access to witness statements and was denied the opportunity to question some of those witnesses.

This Court's scope of review of the hearing officer's decision is "limited to whether the department's action is authorized by law or rule and whether the decision or order is supported by competent, material and substantial evidence on the whole record." MCL 791.255(4); *Lewis v Dep't of Corrections*, 232 Mich App 575, 577; 591 NW2d 379 (1998). Substantial evidence "is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Lewis*, *supra* at 577-578, citing *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996), aff'd 458 Mich 540; 581 NW2d 707 (1998). In light of the hearing officer's opportunity to hear the testimony and view the witnesses, great deference is afforded to the hearing officer's factual findings and credibility determinations. *Lewis*, *supra* at 578. The review is confined to the record and any supplemental proofs demonstrating irregularity in procedure. MCL 791.255(4).

A prisoner is "not entitled to the same constitutional rights and safeguards that are attendant to proceedings which resulted in the prisoner's initial loss of liberty." *Tauber v Dep't of Corrections*, 172 Mich App 332, 336; 431 NW2d 506 (1988), citing *Wolff v McDonnell*, 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (1974); *Dickerson v Marquette Prison Warden*, 99 Mich App 630, 635; 298 NW2d 841 (1980). As this Court explained in *Tauber*, *supra* at 336-337:

> Specifically, prisoners are not constitutionally entitled to full rights of confrontation and cross-examination in connection with disciplinary proceedings. In the interests of safety and to lessen the risks of reprisal, the scope of confrontation and cross-examination afforded to inmates must be left to the sound discretion of the prison authorities. *Wolff, supra*; *Casper v Marquette Prison Warden*, 126 Mich App 271, 273; 337 NW2d 56 (1983).

However, a prisoner is entitled under the due process clause of the Fourteenth Amendment to notice and a hearing in connection with disciplinary determinations involving

serious misconduct. *Wolff, supra*; *Tocco v Marquette Prison Warden*, 123 Mich App 395, 398; 333 NW2d 295 (1983). Such a hearing must include: (1) advance written notice of the charges at least 24 hours prior to the disciplinary hearing; (2) a written statement by the factfinder explaining the reason for any disciplinary action, such statement to be supplied to the prisoner; and (3) the opportunity to call witnesses and present documentary evidence if this would not be unduly hazardous to institutional safety or correctional goals. *Wolff, supra*; *Tocco, supra* at 399.

Our Legislature enacted § 52 of the Corrections Code of 1953 for the purpose of complying with the due process requirements of *Wolff, supra*. See *Tocco, supra* at 399. Section 52 provides, in relevant part:

> The following procedures shall apply to each prisoner hearing conducted pursuant to [MCL 791.251(2)]:
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> * * *
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> (e) A prisoner may not cross-examine a witness, but may submit rebuttal evidence. *A prisoner may also submit written questions to the hearings officer to be asked of a witness or witnesses. The hearings officer may present these questions to and receive answers from the witness or witnesses.* The questions presented and the evidence received in response to these questions shall become a part of the record. *A hearings officer may refuse to present the prisoner's questions to the witness or witnesses. If the hearings officer does not present the questions to the witness or witnesses, that reason for the decision not to present the questions shall be entered into the record.*
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> * * *
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> (g) The hearings officer may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. *Irrelevant, immaterial, or unduly repetitious evidence may be excluded. The reason for the exclusion of the evidence shall be entered into the record.* An objection to an offer of evidence may be made and shall be noted in the record. The hearings officer, for the purpose of expediting a hearing and if the interest of the parties are not substantially prejudiced by the action, may provide for the submission of all or part of the evidence in written form.
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> (h) Evidence, including records and documents in possession of the department of which the hearings officer wishes to avail himself or herself, shall be offered and made a part of the record. *A hearings officer may deny access to the evidence to a party if the hearings officer determines that access may be dangerous to a witness or disruptive of normal prison operations. The reason for the denial shall be entered into the record.* [MCL 791.252 (emphasis supplied).]

Petitioner argues that the hearing officer violated subsections 52(e) and 52(h) by denying him access to several corrections officers' written statements concerning the event leading to the misconduct charge and by refusing to submit questions to some of the witnesses. Petitioner argues that he was prejudiced in his ability to prepare a defense because several of the officers

made conflicting statements and because the hearing officer's proffered reasons for denying petitioner access to the written statements (i.e., the Misconduct Report provided adequate notice of the charge and the statements were present at the hearing and petitioner was given an opportunity to respond to them) were insufficient under § 52(h).

We disagree with petitioner's contention that the hearing officer violated § 52(h). The hearing officer correctly noted that a prisoner does not have a right to witness statements prior to the hearing. Although § 52(h) provides that access to MDOC evidence may be denied to a party only if "the hearings officer determines that access may be dangerous to a witness or disruptive of normal prison operations," this does not give rise to a right to access such evidence *prior* to the hearing. The hearing officer's report establishes that petitioner was provided access to the witness statements at the hearing and that he was given the opportunity to respond to them.

Moreover, any error in the hearing officer's rulings was harmless. Pursuant to MCR 2.613(A), an error or defect is not ground for disturbing a judgment or order "unless refusal to take this action appears to the court inconsistent with substantial justice." MCL 24.306(1) further provides that an agency decision may be set aside only when the "substantial rights of the petitioner have been prejudiced." *Tocco*, *supra* at 397-398, 401. Petitioner has failed to demonstrate that the denial of pre-hearing access to witness statements resulted in any prejudice to him whatsoever. Shyne's failure to mention observing an assault upon Marrero is consistent with Oliver's statements that he observed petitioner knee Marrero in the groin and that Oliver then pushed his way into the room; it is also consistent with the sequence of events enumerated in Marrero's statement: petitioner grabbed him by the lapel and kneed him in the groin, and Oliver and other officers rushed in to assist. Shyne's statement that he and Oliver forced open the door to the quiet room is perfectly consistent with Oliver's statement that he "pushed" his way into the room. Moreover, whether Shyne and/or Oliver had to force open the quiet room door is simply immaterial to the basis for the misconduct charge in this case: that petitioner assaulted Marrero by kneeing him in the groin. Similarly, the hearing officer's alleged misquoting of Shyne that he and Oliver "worked at rolling prisoner off Marrero," as opposed to Shyne's actual statement that he and Oliver rolled prisoner to the floor with Marrero on the bottom, is not relevant to the misconduct determination. Moreover, petitioner admitted that he, Marrero, and the responding officers all fell to the ground, with Marrero at the bottom of the fall. In short, none of the allegedly conflicting statements in the officers' written reports was material to petitioner's ability to prepare a meaningful defense.

Nor has petitioner demonstrated any violation of § 52(e) in the hearing officer's refusal to ask petitioner's submitted questions. Section 52(e) provides that a hearing officer "may refuse to present the prisoner's questions to the witness or witnesses"; furthermore, § 52(g) provides that "[i]rrelevant, immaterial, or unduly repetitious evidence may be excluded." Petitioner's proffered question to Captain Evans concerning Oliver's desire to have petitioner moved to a different unit one month before the assault occurred was, as the hearing officer held, irrelevant to the misconduct charge. Petitioner's request for statements from morning shift officers as to whether they passed along information that he was locked in the quiet room for refusing to move to the A unit was, likewise, irrelevant; moreover, as the hearing officer noted, it was undisputed that petitioner was, indeed, locked in the quiet room because he was refusing to move to the A unit. Finally, the hearing officer properly held that petitioner's requested questions of Oliver concerning whether petitioner was trying to get out the door and whether Oliver was trying to

close the door were unduly repetitious in light of Oliver's written statement, which addressed these issues. Any error resulting from the disallowance of petitioner's proffered questions certainly cannot be said to have prejudiced petitioner's substantial rights. MCL 24.306(1); *Tocco*, *supra* at 401.

In sum, although the circuit court erred in ruling that petitioner's suit was untimely filed, the court did not err in alternatively granting respondent's motion to affirm petitioner's major misconduct citation.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio